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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 721

REID B. SCOTT, PETITIONER,

VS.

AARON COHEN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

I.

This petition for certiorari arises out of the United States Circuit Court of Appeals for the Fifth Circuit affirming, on the 3rd day of December, 1940 (R. p. 89), the judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, in cause styled *J. R. Cone* v. *Oda Parish et al.*, No. 39, Civil Action, which judgment was rendered on the 10th day of April, 1940 (R. p. 80).

Reid B. Scott and Aaron Cohen, both defendants in the above cause, filed cross action against each other for title to one-half the mineral under the S. E. Quarter of Section 897, Block "D," Yoakum County, Texas. Aaron Cohen recovered judgment in the trial court against petitioner to this one-half mineral interest solely on the doctrine of estoppel by deed, or after-acquired title.

Petitioner filed a motion for rehearing in the Fifth Circuit Court of Appeals, setting up the identical questions which hereafter will be presented.

This controversy involves the unique Texas real property law, unique as a combination of the civil statutory and common law systems. This controversy involves oil and gas law, of which the State of Texas has also developed a unique jurisprudence.

The evidence supporting the after-acquired title of respondent is all documentary and a listing thereof summarizing the questions arising in this suit. The list is in chronological order of happening:

1. February 6, 1926, deed of trust lien from S. A. (Gus) Jones to Frank D. Howell, for the benefit of B. H. and Royce S. Oxford, filed for record in the county clerk's office of Yoakum County, Texas, on February 17, 1926 (R. p. 11-13).

2. September 1, 1926, mineral conveyance, S. A. (Gus) Jones and wife to appellee, Aaron Cohen, filed for record in the county clerk's office of Yoakum County, Texas, September 30, 1926 (R. p. 8-11). (This conveyance being the one relied upon by the appellee for his recovery in this case.)

3. January 4, 1927, trustee's deed, Frank D. Howell to Royce A. Oxford, filed for record in the county clerk's office of Yoakum County, Texas, March 12, 1927 (R. p. 16-17).

4. January 4, 1927, deed, Royce A. Oxford and wife, to S. A. Jones, reserving a vendor's lien to secure the balance of the unpaid purchase price, filed for record in the county clerk's office of Yoakum County, Texas, June 14, 1927 (R. p. 17-20).

5. June 8, 1927, warranty deed, S. A. Jones and wife to Tommye Jones, reserving a vendor's lien, to secure the balance of the unpaid purchase price, filed for record in the county clerk's office of Yoakum County, Texas, June 14, 1927 (R. p. 20-22).

6. September 9, 1927, release of vendor's lien by Royce A. Oxford, releasing the vendor's lien retained in the deed from Royce A. Oxford and wife to S. A. Jones (R. p. 24).

7. January 12, 1929, deed of trust, Tommye Jones to C. A. Williams for the benefit of Reid B. Scott, filed for record in the county clerk's office of Yoakum County, Texas, on February 2, 1929 (R. p. 25-31).

8. May 6, 1930, trustee's deed, C. A. Williams to Reid B. Scott, filed for record in the county clerk's office in Yoakum County, Texas, May 8, 1930 (R. p. 31-39).

Each of the above conveyances concern the southeast quarter of the land in controversy. Petitioner has been awarded the surface of this southeast quarter and seeks to establish title to an undivided one-half mineral interest therein. The approximate value of this mineral interest is $75,000.

II.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit on petition for certiorari by virtue of Section 240, as amended, of the Judicial Code (Sec. 347, Tit. 28, U. S. C. A.), and by court Rule 38 (5) of the rules of the Supreme Court of the United States, 1939, the decisions of the circuit court of appeals being in conflict with the decisions of the intermediate courts and the courts of last resort of the State of Texas, and being in conflict with decisions of the United States Supreme Court. The decision of the Circuit Court involves an important question of Texas mineral law.

III.

The questions presented by petitioner are:

(1) Whether the trial court and the circuit court of appeals erred in holding that the royalty contract conveyed a one-half mineral interest in the land in controversy (R. p. 80) on the doctrine of estoppel by deed or after-acquired title, as against petitioner's claim that the royalty conveyance in question was sufficient to convey any interest by way of estoppel by deed or after-acquired title.

(2) Whether the trial court and circuit court of appeals correctly held that the mineral conveyance in question (R. p. 8) sufficiently described the subject matter of the conveyance so as to satisfy the requirements of the Texas statute of frauds (Appendix p. 17).

(3) The trial court and the circuit court, having ignored this issue, whether or not respondent's grantor, who held his right subject to a vendor's lien retaining title, had an interest in realty which could feed the respondent's claim of after-acquired title and support the judgment rendered for him.

IV.

The reasons relied on for the allowance of the writ are as follows:

(1) The decision of the circuit court of appeals (R. p. 89) holding that the royalty conveyance in question (R. p. 8) conveyed a one-half mineral interest under the properties in question is contrary to the holding of the Supreme Court of Texas in *Hoffman* v. *Magnolia Petroleum Company*, 273 S. W. 828; *O'Fiel* v. *Brooks*, 98 S. W. 2d 266 (C. C. A.); *Tipps et al.* v. *Bodine*, 101 S. W. 2d 1076 (C. C. A.); *Olvey et al.* v. *Jones et al.*, 95 S. W. 2d 980 (C. C. A.); each of these decisions holding that the royalty conveyance in question conveyed merely an interest in whatever rents, if any, under the oil and gas lease described, an interest in whatever royalties, if any, thus

accrued, and an interest in a possibility of reverter, the reversionary interest being described by the oil and gas lease in the royalty conveyance.

(2) Since the mineral conveyance in question is dependent upon the quantum of estate conveyed under an oil and gas lease, the holding of the circuit court of appeals awarding respondent an indefeasible one-half mineral interest (R. p. 89) is in conflict with the holding of the Texas Supreme Court in *Sheffield* v. *Hogg*, 77 S. W. 2d 1021, wherein the Texas Supreme Court held that an oil and gas lease created a determinable fee only.

(3) The decision of the circuit court of appeals (R. p. 89) in holding that the royalty conveyance (R. p. 8) in question was effective to create an estoppel by deed, is probably in conflict with the cases of *Smith* v. *Griffin*, 116 S. W. 1064 (Com. App.); *Taubert* v. *Earl*, 133 S. W. 2d 145 (C. C. A.); *Fagg* v. *Texas Company et al.*, 57 S. W. 2d 87 (Tex. Com. App.); *Sneed* v. *Lester*, 76 S. W. 2d 802 (.....), which cases hold that a conveyance of an oil and gas lease or an interest therein which fails to identify or sufficiently describe the oil and gas lease, which is a part of the subject matter of conveyance, is ineffective against the statute of frauds.

(4) In the decision of the circuit court of appeals by ignoring plaintiff's proffered theory that Aaron Cohen's grantor, Gus Jones, had no interest upon which the after-acquired title could operate, since Gus Jones's interest in the realty was subject to a vendor's lien, coupled with title, is in conflict with the decision of the Texas Supreme Court in *Johnson* v. *Smith*, 280 S. W. 158, and a Court of Civil Appeals of Texas in *Waukee* v. *Hill*, 99 S. W. 2d 1047, both of the above decisions holding that where a vendor's lien is retained, the grantee, under such a conveyance, has a mere right to possession, an interest which he can convey by parol or can abandon.

(5) Each of the above conflicts is on an important question of local law.